

A KANTHA RASALINGAM v. SHAMSUNNISA
M.A. ABDUL JABBAR & ORS
COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: M-02(NCVC)(W)-1707-10-2015]
8 MARCH 2017

C **COMPANY LAW:** Shares – Transfer – Share sale agreement – Sale and transfer of shares of bumiputera companies to non-bumiputera individual – Whether agreement lawful – Whether transfer of shares valid and could be effected – Whether infringed bumiputera policy – Bumiputera companies formed by private individuals – Whether bumiputera companies could amend relevant provision in memorandum and articles of association to accomplish transfer of shares – Contracts Act 1950, s. 25 – Companies Act 1965, s. 31

D **CONTRACT:** Agreement – Share sale agreement – Sale and transfer of shares of bumiputera companies to non-bumiputera individual – Whether agreement lawful – Whether infringed bumiputera policy – Contracts Act 1950, s. 25

E Pursuant to a share sale agreement ('SSA'), the first to third respondents, the directors of fourth to seventh respondents, agreed to sell to the appellant, a non-bumiputera, 40% of shareholding in the fourth to seven respondents for a consideration of RM4,572,000. The sixth and seventh respondents were bumiputera companies. The transfer of the 40% shareholding was to be done by instalment in proportion to the amount of payments made by the
F appellant. However, despite the payment of RM1.6m, no shares were transferred to the appellant. The appellant sought specific performance of the SSA at the High Court. The respondents argued that (i) there was no sanction or approval from the Board of Directors, which was a pre-condition under the SSA; (ii) there was a fundamental mistake between the parties regarding
G the shares in the bumiputera companies which could not be transferred to a non-bumiputera; and (iii) transfer of the shares in the bumiputera companies to a non-bumiputera is illegal and could not be legally performed. In view of two pieces of Melaka customary land ('MCL') held by the seventh respondent and the bumiputera status of the sixth and seventh respondents,
H the High Court Judge dismissed the appellant's claim on the ground that any dealings involving non-bumiputera would infringe the bumiputera policy and this rendered the SSA unlawful under s. 25 of the Contracts Act 1950. Hence the present appeal.

I

Held (allowing appeal with costs; setting aside orders of High Court and ordering accordingly)

Per David Wong Dak Wah JCA delivering the judgment of the court:

- (1) Both the sixth and seventh respondents were companies formed by private individuals who have the freedom of choice to make whatever regulations they deem fit as to how their companies are to be regulated. There is no prohibition in law to the freedom of choice in that the memorandum and articles of association could be changed. In fact, the contrary is true as s. 31 of the Companies Act 1965 allows it. The intention of the SSA was crystal clear; the appellant wanted to become a shareholder in the fourth to seventh respondents for an agreed consideration which the first to third respondents had agreed to by accepting the sum of RM1.6 million. From the implications, the respondents had a duty to remove whatever hurdles to accomplish the intention. (paras 14 & 15)
- (2) Sections 104 and 105 of the National Land Code (Penang and Malacca Titles) Act 1963 shows that the State Authority has the discretion to declare a person who is not a Malay to be registered as proprietor of MCL. The respondents failed to discharge the burden of proof that the seventh respondent, if with a 40% non-bumiputera company, could not hold MCL in Melaka. There was no legal impediment to amend the memorandum and articles of association of the sixth and seventh respondents to ensure the appellant become a shareholder of the same. (paras 18-22)

Bahasa Malaysia Headnotes

Susulan satu perjanjian jualan saham ('PJS'), responden pertama hingga ketiga, pengarah responden keempat hingga ketujuh, bersetuju menjual kepada perayu, seorang bukan bumiputera, pegangan saham sebanyak 40% dalam responden keempat hingga ketujuh bagi balasan RM4,572,000. Responden keenam dan ketujuh ialah syarikat bumiputera. Pindahan pegangan saham sebanyak 40% tersebut akan dilakukan secara ansuran berpadanan dengan jumlah yang perayu bayar. Walaupun perayu telah membayar RM1.6 juta, saham tersebut tidak dipindahkan. Perayu memohon pelaksanaan spesifik PJS di Mahkamah Tinggi. Responden-responden mendalihkan (i) tiada kebenaran atau kelulusan oleh Lembaga Pengarah, satu prasyarat yang ditetapkan dalam PJS; (ii) berlaku kesilapan besar antara pihak-pihak berkaitan saham dalam syarikat bumiputera yang tidak boleh dipindah milik kepada seorang bukan bumiputera; dan (iii) pindah milik saham dalam syarikat bumiputera kepada bukan bumiputera tidak sah dan tidak boleh dilaksanakan. Berdasarkan dua bidang tanah adat Melaka ('TAM') yang dipegang oleh responden ketujuh dan status bumiputera

A responden keenam dan ketujuh, Hakim Mahkamah Tinggi menolak tuntutan perayu dengan alasan apa-apa urusan melibatkan seorang bukan bumiputera mencabuli polisi bumiputera dan ini menjadikan PJS tidak sah bawah s. 25 Akta Kontrak 1950. Maka timbul rayuan ini.

B **Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi dan memerintahkan sewajarnya)**
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

C (1) Responden keenam dan ketujuh adalah syarikat-syarikat yang ditubuhkan oleh individu-individu persendirian yang bebas untuk memilih apa-apa peraturan yang mereka fikirkan sesuai untuk mengawal syarikat. Tiada larangan undang-undang terhadap kebebasan pilihan iaitu memorandum dan artikel persatuan boleh diubah. Malah s. 31 Akta Syarikat 1965 membenarkannya. Niat PJS jelas; perayu berkehendak menjadi pemegang saham dalam responden keempat hingga D ketujuh bagi balasan yang disetujui dan ini seterusnya disetujui oleh responden pertama hingga ketiga kerana mereka menerima bayaran RM1.6 juta tersebut. Implikasinya, responden-responden mempunyai tugas mengatasi apa-apa kesukaran untuk mencapai niat tersebut.

E (2) Seksyen 104 dan 105 Akta Kanun Tanah Negara (Hakmilik Pulau F Pinang dan Melaka) 1963 menunjukkan Pihak Berkuasa Negeri mempunyai budi bicara mengisytiharkan agar seorang bukan Melayu didaftar sebagai pemilik TAM. Responden-responden gagal melepaskan beban pembuktian bahawa responden ketujuh, jika dengan 40% syarikat bukan bumiputera, tidak boleh memegang TAM di Melaka. Tiada halangan undang-undang untuk meminda memorandum dan artikel pertubuhan responden keenam dan ketujuh bagi memastikan perayu menjadi pemegang saham.

Legislation referred to:

G Companies Act 1965, s. 31
Contracts Act 1950, s. 25
National Land Code (Penang and Malacca Titles) Act 1963, ss. 104, 105

*For the appellant - Cyrus Das, Michael Chow & CH Cheong; M/s Michael Chow
For the respondent - Kesavan, FH D'Cruz & Stephanie Kesavan; M/s Othman Hashim & Co*

H *[Editor's note: Appeal from High Court, Melaka; Suit No: 22NCVC-92-12-2013 (overruled).]*

Reported by Najib Tamby

I

JUDGMENT

A

David Wong Dak Wah JCA:**Introduction**

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed the appellant's/plaintiff's claim to enforce or for specific performance of a share sale agreement dated 13 January 2011 (SSA) where the appellant had agreed to purchase 40% shareholding in the fourth to the seventh respondents/defendants from the first to the third respondents/defendants.

B

[2] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

C

Background Facts

[3] The factual matrix in this case is set out quite clearly by respective counsel which we adopt and will only set out the salient facts in this judgment. We are able to do that as the facts are hardly disputed by the parties as the issues emanating from it are in essence questions of law.

D

[4] The document giving rise to this dispute is SSA where the first to third respondents agreed to sell to the appellant 40% shareholding in the fourth to the seventh respondents for a consideration of RM4,572,000. The first to the third respondents are directors and shareholders of the fourth to seventh respondents.

E

[5] The consideration of RM4,572,000 is premised on the agreed valuation of the worth of the 40% shareholding in the fourth to seventh the respondents. The mode of payment of the aforesaid consideration is set out in cl. 2 of SSA which in essence states that it will be paid by way of progressively increasing instalments starting from 15 January 2011 to 15 October 2015. At the commencement of this suit, the appellant had paid a sum of RM1.6 million to the first to third respondents.

F

[6] The appellant, after the execution of SSA, was appointed to the Board of Directors of the fourth to seventh respondents. As for the transfer of the 40% shareholding in the fourth to seventh respondents, it shall be done by way of instalment in proportion to the amount of payments made by the appellant. The full 40% shareholdings shall be transferred upon full payment of the consideration of RM4,572,000.

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H

[7] In view of the appellant's undisputed payment of RM1.6 million, no shares were transferred to the appellant. This led to the appellant writing a letter on 21 November 2013 which is reproduced herein:

I

A

Kantha a/l Rasalingam
No.16, Jalan 14/37B, (46100) Petaling Jaya, Selangor

Date: 21 November 2013

B

Shamsunnisa @ Shamsun Nahar Binti M.A Abdul Jabbar
No.3783, Jalan Spring 3,
Taman Spring Gardens,
76400 Melaka

C

Mohamed Irfan bin Mohamed Ishak
No.3783, Jalan Spring 3,
Taman Spring Gardens,
76400 Melaka

Noor Shaheen Binti Mohamed Ishak
No.3783, Jalan Spring 3,
Taman Spring Gardens,
76400 Melaka

Dear Shamsunnisa, Irfan and Shaheen,

Re: Share Sale Agreement Dated 13.1.2011

D

I refer to the above Agreement being in respect of my acquisition of shares from you in Bio-Nutritional Laboratory (Malaysia) Sdn Bhd, LongTerm Focus Sdn Bhd, Inner Splendour Sdn Bhd, Foremost Power Sdn Bhd for a total purchase price of RM4,672,000.00.

Clause 5.1 (c) of the Agreement provides, among other things, as follows:-

E

- (i) upon receipt of payment of 10% of the purchaser price by you as vendors, you, Shamsunnisa shall facilitate the transfer of the shares of Irfan in the companies to me;
- (ii) upon receipt of payment of the next 10% of the purchaser price by you as vendors, you, Shamsunnisa shall facilitate the transfer of the shares of Shaheen in the companies to me;
- (i) and upon receipt of payment of the subsequent 10% of the purchaser price by you as vendors, you, Shamsunnisa shall transfer your 10% in the companies to me.

F

My records show that so far I have paid a sum of RM1,600,000.00 towards the said purchase price which is in excess of 30% of the same.

~~I am therefore entitled to 20% of the shares in each of the companies mentioned.~~

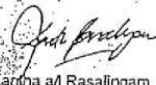
G

I am writing to formally require you to take steps to make immediate compliance with Clause 5.1(c) of the said Agreement. I require this issue to be resolved within the next forty eight (48) hours with my name appearing on the register of members to the extent of my entitlement as stated above.

I would appreciate your immediate and urgent attention given that the matter is long outstanding.

Yours truly,

H


Kantha a/l Rasalingam

I

Che Rohana binti Mohd Amin
Partner
Mustaffa & Associates
250-B, Jalan Melaka Raya 3,
Taman Melaka Raya,
75000 Melaka.

[8] The respondents replied to the appellant's letter through their solicitors in a letter dated 25 November 2013 which is reproduced herein:

Orhman Hashim & Co.
Peguambela & Peguambela
Advocates & Solicitors

26-1 & 28-1, Jalan BPM 5,
Taman Bukit Piatu Mutiara, 75050 Melaka.
Tel 06-2820751, 06-2820308, 06-2815285
Fax 06-2820308
E-mail: ohcmko@ohc.com.my
Office Hours: Monday - Friday 8.30am - 5.30pm.

26-1 & 28-1, Jalan BPM 5,
Taman Bukit Piatu Mutiara, 75050 Melaka.
Tel 06-2820751, 06-2820308, 06-2815285
Fax 06-2820308
E-mail: ohcmko@ohc.com.my
Office Hours: Monday - Friday 8.30am - 5.30pm.

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Partners:
Dato' Orhman Hashim D.I.A.L.F.,
Ting Kong Hock
Abd. Rahman Mahmood
Datuk Kesavan P. Krishnan
O.M.S.M., D.S.M.
Azli Ahmad Shaghir
Laxle Bala
Kamajiet Kaur
Gowri Samintha
Zarni Ali Hassan
Kantawi Karapiah
Loh Chang Yen
Jei Sooria V.P.
Aidah Mohamed
Ika Rehan Jemari
Aimi Shariza Azli
Ahmad Tumizi Juhari
Tan Lee Kiat

Consultant:
D'Crex, Francis Hilary.

Legal Assistants:
Wangsa Maje Office
Siti Farah Azlul

Kuala Lumpur Office:
Ngan Fui-Fai
Ng Sui Hong
Shapikhan Krishnan
Mazr Mohd Lamagan Ganis
Hamidi Masrizah Ab. Hamid
Siti Amisah Ismail
Vishnu Kumar R. Viswanathan
Somayah Abdul Latib
Kokilaveny Kanaganathan
Ily Nadiah Mohd Yusof

Najwa Zahrah Mansor
Wong Kah Hung
See Sue Yong
Maisyarah Amirulrah
Patricia Louis
Sholehan A. Rahim
Nur Aini Mohd Noor

Penang Office:
Hafidzah Jaafar
Catherine Heah Gek Yim, P.M.
Shamini Thiagarajah
Ayleenwary Bathamanathan
Harun Khal Sark
Wan Nazri Othman
Goon Swee Kheng
Gory Khoo Eui Zhi
Muhammad Najib Rahier

Selangor Office:
Hamed Haimi Azli
Ashwathi Ahnnaa Radzi

Johor Bahru Office:
Siti Zakiah An. Son
Muzikah Mond Azzali
Alzudin Baharum
Shahidul Karim
Mohd Nizar Anshad

Malacca Office:
Mazhar Mazhar Rajagopalan

Kuala Terengganu &
Kuala Bharu Office:
Jasvinder Joon
Sohamwanti Datta-Deb
Nur Azlita Ab. Aziz
Zahara Nuri

Your Ref: OHC/M/K/1008/2013/L/m Dated: 25 November, 2013

Our Ref:

Dr. Kantha a/l Ramalingam
No. 16, Jalan 14/37B,
46100 Petaling Jaya
Selangor Darul Ehsan.

WITHOUT PREJUDICE
By E-mail & Post only
kr_dr@hotmail.com

Dear Sir,

Re: Share Sale Agreement dated 13.01.2011

We refer to the above wherein we act for Mdm. Shamsunnisa @ Shamsun Nahar binti M.A. Abdul Jabbar, Mohamed Irfan bin Mohamed Ishak and Noor Shaheen binti Mohamed Ishak.

We have been instructed to reply to your letter dated 21.11.2013. Our clients say that Clause 5.1 (c) states a precondition as follows:

"a Director's Resolution of the company sanctioning and approving the transfer of the shares in favour of the purchaser"

We have been informed by our clients that there are no Director's Resolutions which sanction and approve the sale of the shares to yourself.

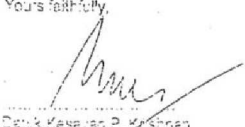
Our client's further believe that the required Directors' resolution sanctioning and approving the sale will not be forthcoming.

Under the circumstances, we are instructed to enquire from yourself if you would agree to abort the sale of shares.

Your early reply would be greatly appreciated.

Thank you

Yours faithfully,


Datuk Kesavan P. Krishnan

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A [9] Subsequent to the respondents' letter, the appellant took out this suit for specific performance of the SSA.

[10] In response to the suit, the respondents' defence is set out in para. 6 of the submission of learned counsel which states as follows:

- B (i) Clause 5.1(c) of the SSA provides that a Directors' resolution sanctioning the transfer and registration of the shares in favour of the Purchaser according to the manner set out in paragraph 2.3(d), (e) and (f) above shall be passed as a precondition to the transfer of the shares. Paragraph 11 of the Defence states that there is no resolution of the companies sanctioning and approving the transfer of the shares to the Appellant.
- C (ii) Paragraph 12 of the Defence states that according to the Memorandum and Articles of Association of the Companies, the Directors' approval for transfer of shares to an outsider is required and the Board is not required to give reasons if the application to transfer shares is refused.
- D (iii) According to paragraph 14 of the Defence, an important factor which prevents the transfer of the shares to the Appellant is that the 6th and 7th Respondents are 100% Bumiputera companies. The Appellant or Purchaser is a person of Indian origin and it is not legally possible to transfer the shares in those companies to the Plaintiff or his nominee.
- E (iv) The Respondents have pleaded in paragraph 15 and 16 of the Defence that the parties have entered into the SSA as a result of a mistake as to the status of the shares and also the amount of shares held by each Vendor.
- F (v) Further that both parties share a common mistake that the shares of the 6th and 7th Defendant can be sold or purchased by a non-Bumiputera and registered in the name of a non-Bumiputera.
- G (vi) In paragraph 17 of the Respondents' Defence, the Respondents have pleaded that the SSA cannot be performed for the following reasons:
- H (a) there is no sanction or approval from the Board of Directors of the Companies which is a pre-condition under Clause 5.1(c) of the SSA;
- (b) there is a fundamental mistake between the parties regarding the shares in the Bumiputera Companies which cannot be transferred to a non-Bumiputera;
- (c) transfer of the shares in the Bumiputera Companies to a non-Bumiputera is illegal and cannot be legally performed;
- I (vii) In paragraph 18 of the Respondent's Defence, the Respondents have pleaded that the Appellant is not entitled to claim specific performance of the SSA because the Appellant has breached the agreement to pay the instalments according to the time stipulated.

- (viii) In paragraph 19 of the Respondents Defence, the Respondents have pleaded that the Appellant is not entitled to the remedy of specific performance because of want of mutuality since the Respondent is not entitled to the remedy of specific performance in the event the Appellant breaches the contract. A
- (ix) In paragraphs 20 and 21 of the Respondents' Defence, the Respondents have pleaded that the relationship between the parties has deteriorated to such an extent that the Appellant has attempted to wind-up two of the companies that are included in the SSA; B
- (x) The First Respondent has refused to communicate directly with the Appellant. The 1st Respondent has refused and/or is incapable of continuing any relationship with the Appellant which will seriously affect the management and performance of the companies. C
- (xi) In paragraph 22 of the Respondents' Defence, the Respondents have pleaded that the SSA is void in law.
- (xii) In the alternative, the Respondents have pleaded in paragraph 22 of the Defence that they were under an influence of mistake of fact that a portion of the shares in the 6th and 7th Respondents companies which are Bumiputera companies could be transferred to the Appellant. D
- (xiii) The Respondents have further pleaded in paragraph 24 of the Defence that the Respondents, particularly the 6th and 7th Respondents would suffer extreme hardship if the SSA is specifically performed against them. E
- (xiv) The 1st to 3rd Respondents have further pleaded that they are prepared to return the monies paid by the Plaintiff to date.

High Court Decision And Reasons F

[11] The learned judge dismissed the appellant's claim premised principally that the SSA is unlawful and this was how the learned judge fashioned his grounds:

- 10. Tidak dinafikan pihak-pihak telah memasuki SSA tersebut yang tujuannya adalah untuk menjual dan memindahkan 40% saham dalam syarikat defendan ke-4, 5, 6, dan 7. Saya dapati syarikat defendan ke-6 dan ke-7 merupakan syarikat bertaraf bumiputera yang memerlukan pegangan 100% bumiputera dan diuruskan oleh 100% pengarah bumiputera pada setiap masa. Selaras dengan tujuan itu, plaintiff telah membayar sejumlah RM1,600,000.00 sebagai sebahagian balasan bayaran ansuran kepada defendan pertama, kedua dan ketiga. G
 - 11. Saya bersetuju kedua-dua pihak sedar bahawa mereka memasuki satu perjanjian yang melibatkan pemindahan saham bumiputera kepada bukan bumiputera. Keterangan menunjukkan plaintiff mengetahui kedudukan ini. Klausula 5 SSA tersebut (muka surat 189: Ikatan C) di bawah tajuk Due Diligence menyatakan: H
- I

- A The Purchaser by himself or through his agents has conducted a financial and legal due diligence exercise on the Companies and the Subsidiary's financial position and affairs but not limited to the Audited Accounts and Management Accounts (hereinafter referred to as "the Financial and Legal Due Diligence") and has been completed and in the absolute
- B opinion of the Purchaser the Financial and Legal Due Diligence is found to be satisfactory.
- Begitu juga di klausa 9.1 SSA tersebut (muka surat 198: Ikatan C) yang menyatakan:
- C The purchaser has conducted a financial, legal due diligence exercise on the company including but not limited to the Audited Accounts and the management Accounts and confirm that the financial diligence is up to his satisfaction.
- D The Purchaser is satisfied that the Vendor has not misrepresented any affair or the financial position of the company and that prior to the execution of this Agreement has carried a full financial and legal due diligence and the Vendor has fully co-operated in providing all the information requested by the Purchaser".
- E Selanjutnya di Klausa 7(v)(a) (muka surat 191: Ikatan C) di bawah tajuk Tataujud (memorandum) dan Tataurus (article) syarikat dinyatakan:
- F The copy of the Memorandum and Articles of Association of the Company delivered by the Vendor(s) to the Purchaser(s) which for the purpose of identification has been signed by the Company Secretary is true and complete and contain all amendments up to date of this Agreement or has embodied therein or annexed thereto a copy of every such resolution as is required by law to the embodied or annexed.
- G Rujukan lanjut harus juga dilakukan ke atas tataujud dan tataurus syarikat defendan ke-6 (ms 104, 106 dan 107: Ikatan C) dan juga tataujud dan tataurus syarikat defendan ke-7 (ms 133, 135-136 : Ikatan C). Harus diambil catatan bahawa Notis Resolusi Defendan ke-6 bertarikh 20.1.2004, manakala Notis Resolusi defendan ke-7 bertarikh 20.5.2004, kedua-dua tarikh adalah sebelum tarikh SSA dimasuki iaitu 13.1.2011.
- H 12. Berdasarkan keterangan di atas saya bersetuju dengan hujahan peguam defendan yang terpelajar bahawa inferens yang tidak dapat dielakkan daripada keterangan tersebut ialah plaintif mempunyai pengetahuan penuh bahawa defendan ke-6 dan ke-7 merupakan syarikat bumiputera dengan pegangan serta pengarahnya semestinya juga bumiputera pada setiap masa. Selaras dengan peruntukan seksyen 91 dan 92 Akta Keterangan 1950, pihak plaintif tidak boleh menyangkal atau menafikan peruntukan SSA tersebut dan kesimpulan yang dibuat daripada keterangan di atas. Jelasnya, tujuan SSA dan balasan yang dibayar adalah tidak sah dan ergo, terbatal dan tidak boleh dikuatkuasakan.
- I

13. Kesimpulan ini didokong lanjut oleh kes *Kondapuram Raghuram v. Soo Peng @ Yew Soo Peng* [2006] 7 MLJ 510. Dalam kes ini YA Hakim Ramly Ali (ketika itu) telah menyentuh isu pemakaian seksyen 24(e) Akta Kontrak 1950 dalam konteks perkiraan (arrangement) 'Ali Baba' di muka surat 522 seperti yang berikut:
- What the petitioner seeks from this court in his petition is, *inter alia*, for the court's sanction and the giving effect of his purported scheme elaborately designed to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government and the quasi-government bodies into the company and untrue 'bumiputera' status company, thus enabling the company, opportunity to receive the special contracts. The petitioner's act is designed to circumvent the new economic policy where bumiputera participation in business is in line with. This tantamount to an improper act and certainly is one which is contrary to public policy. Section 24(e) of the Contracts Act states very clearly that 'the consideration or object of an agreement is lawful unless ... (e) the court regards it as immoral or opposed to public policy.
14. Diperhatikan, dan dengan ini saya bersetuju dengan hujahan peguam defendan, bahawa tujuan plaintif adalah untuk mengambil bahagian dalam sebuah syarikat bumiputera agar dapat membeli tanah adat Melaka (tanah MCL) bagi tujuan pembangunan bangunan residential dan komersial di bawah status khas berkenaan. Tindakan atau pun tujuan tersebut akan mempunyai kesan memperdaya kerajaan atau badan separa kerajaan dan juga memintas dasar ekonomi baru berkaitan dengan pemberian taraf khas tersebut. Tujuan sebegini bukan lah sesuatu yang baru. Jika penghujahan peguam plaintif berkenaan dengan pindaan ke atas tataujud dan tataurusan syarikat yang boleh dilakukan untuk mencapai tujuan tersebut, itu akan memperlekehkan perundangan khas tersebut. Ini amat jelek kerana pihak-pihak akan sewenang-wenangnya menubuhkan sebuah syarikat bumiputera untuk mendapat maafaat yang diberikan tetapi setelah manfaat itu diperoleh mereka boleh memperlekehkan dasar itu dengan meminda tataujud dan tataurusan syarikat untuk membatalkan taraf syarikat berkenaan. Ini dengan jelas terjumlah kepada satu perbuatan yang tidak wajar dan bertentangan dengan dasar awam sepertimana yang diperuntukkan dalam seksyen 24(e) Akta Kontrak 1950.
15. Selain di atas, saya juga bersetuju bahawa SSA tersebut jika dilaksanakan akan mengetepikan atau menewaskan undang-undang sedia ada dan akan bertentangan dengan peruntukan seksyen 24(b) Akta Kontrak 1950, yang antara lain menyatakan:
- the consideration or object of an agreement is lawful unless...
- (a) ...
- (b) it is of such a nature that if permitted, it would defeat any law.

- A Dalilnya, dalam Akta Kanun Tanah Negara (Hak milik Pulau Pinang dan Melaka) 1963 (Act 518) hanya Melayu, sepertimana ditakrifkan dalam Akta ini, berkeupayaan memiliki hartanah MCL. Defendan ke-7 ialah pemilik dua tanah MCL iaitu, Lot No. 3, GMM 10, dan Lot P.T. 549, HMM 51, kedua-duanya terletak di Kawasan Bandar III, Bandar Melaka.
- B Susulan kedudukan itu, defendan ke-7 bukan sahaja Melayu tetapi juga sebuah syarikat Tanah Adat Melaka (Melaka Customary Land Company). Pendaftaran plaintif sebagai pemegang saham dan pengarah defendan ke-7 akan menewaskan atau mengagalkan perundangan di atas. Kedudukan ini bukan sahaja mengagalkan perundangan tersebut malahan juga terjumlah kepada satu frod ke atas pentadbir tanah. Kesimpulan ini disokong oleh kes-kes berikut: *Lee Chua v. Mustafa Osman* [1995] 4 MLJ 22; dan, *Badiaddin bin Mohd Mahiddin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.
- C
- D 16. Saya juga bersetuju dengan hujahan peguam defendan bahawa seksyen 25 Akta Kontrak 1950 juga terpakai di sini. Seksyen 25 Akta Kontrak 1950 tersebut memperuntukkan:
- If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void
- E Dalam kes ini walaupun ketaksahan di atas merujuk kepada tujuan dan balasan perjanjian berkenaan dengan saham bumiputera, namun hal perkara itu merupakan sebahagian daripada satu balasan dan ini menyebabkan keseluruhan SSA tersebut menjadi tidak sah dan dengan itu terbatal.
- F [12] From the above, one can observe that the learned judge was saying that in a transaction of such nature, it must be between bumiputeras in view of the presence of two pieces of Melaka Customary Land (MCL) held by the seventh respondent and the bumiputera status of the sixth (Inner Splendour Sdn Bhd) and seventh respondents (Foremost Power Sdn Bhd). Any dealings
- G involving non-bumiputera would infringe the bumiputera policy entrenched in this country and hence would render the SSA unlawful under s. 25 of the Contracts Act.
- Our Grounds Of Decision**
- H [13] We agreed with the appellant's learned counsel when he submitted that the burden was on the respondents to prove their defence which substantially was that the SSA is an illegal contract which cannot be enforced by the court.
- I [14] The learned judge had found that in view of the bumiputera status of the sixth and seventh respondents, the appellant being a non-bumiputera could not enter into an agreement to become a shareholder as it was prohibited in the memorandum and articles of association of the respective respondents. With respect to the learned judge, he appeared to have ignored the fact that both the sixth and seventh respondents are companies formed

by private individuals who have the freedom of choice to make whatever regulations they deem fit as to how their companies are to be regulated. There is no prohibition in law to the aforesaid freedom of choice in that memorandum and articles of association can be changed. In fact the contrary is true as s. 31 of the Companies Act 1965 allows it. For clarity s. 31 reads as follows:

- (1) Subject to this Act and to any conditions in its memorandum, a company may by special resolution alter or add to its articles.
- (2) Any alteration or addition so made in the articles shall subject to this Act, on and from the date of the special resolution or such later date as is specified in the resolution, be as valid as if originally contained therein and be subject in like manner to alteration by special resolution.
- (3) Subject to this section, any company shall have the power and shall be deemed always to have had the power to amend its articles by the adoption of all or any of the regulations contained in Table A, by reference only to the regulations in the Table or to the numbers of particular regulations contained therein, without being required in the special resolution effecting the amendment to set out the text of the regulations so adopted.

[15] The intention of SSA is crystal clear in that the appellant wanted to become a shareholder in the fourth to seventh respondents for an agreed consideration which the first to the third respondents had agreed to by accepting the sum of RM1.6 million. Hence from implication, the respondents have a duty to remove whatever hurdles to accomplish the aforesaid intention and in this case amend the relevant provision in the memorandum and articles of associations of the sixth and seventh respondents.

[16] The learned judge also appeared to have been influenced by the fact that the ownership of two pieces of MCL Land in Melaka by the seventh respondent. This brings us back to whether the respondents had discharged their burden in proving that the seventh respondent, if its shareholding is held by a non-bumiputera to the extent of 40%, cannot hold MCL lands in Melaka.

[17] Learned counsel for the appellant had submitted that the failure to call anyone versed with the dealings in MCL lands in Melaka by the respondents meant that they had not proved their case. We found merit in the submission bearing in mind that the respondents had intended to call one Raudah binti Rahmat as a witness to confirm that MCL lands in Melaka can be only held by 100% bumiputera owned companies. As to why that witness was not called, there was no explanation. We could only guess that the respondents could have been put off by the evidence of one Abu Bakar bin Mohamad (SP1) a subpoenaed witness from the Jabatan Pendaftaran Negara (JPN). He had put doubt as to whether the first respondent is a bumiputera herself when the records show that she is of the Indian race and hence not a bumiputera. As the respondents had failed to assertively prove that the MCL lands cannot

A be held by companies with 40% non-bumiputera shareholding, there cannot be any scheme by the appellant to circumvent the so-called or illusory bumiputera prohibition as found by the learned judge.

B [18] Furthermore, the existence of ss. 104 and 105 of the National Land Code (Penang and Malacca Titles) Act 1963 shows that the State Authority has the discretion to declare a person who is not a Malay to be registered as proprietor of MCL lands.

[19] For completeness and clarity, ss. 104 and 105 of the National Land Code (Penang and Malacca Titles) Act 1963 respectively provide as follows:

C Section 104:

D (1) Whenever the State Authority is satisfied that any person who is not a Malay is entitled to or otherwise should be registered as the proprietor of any customary land (otherwise than by way of succession pursuant to paragraph 105(b) he may issue a certificate to such person, specifying the name of such person and the land in respect of which such certificate is issued.

E (2) Whenever any certificated person presents to the Land Administrator any certificate referred to in subsection (1) the Land Administrator shall record such person in the appropriate folio of the Malacca Customary Land Register as the proprietor of the land specified therein, and shall endorse such folio in the manner prescribed by paragraph 105(c).

Section 105:

F Where any certificated person is registered as the proprietor of any customary land

(a) he shall not by reason of his status as a certificated person be deemed to be entitled to be registered as the proprietor of any customary land other than that to which he may be entitled under paragraph 99(c) or any certificate issued to him under section 104;

G (b) he shall have a permanent and hereditary right to the ownership of such land, and upon his decease such land shall be transmissible according to the law for the time being in force relating to succession;

(c) the title to such land in the Malacca Customary Land Register shall be endorsed with the words "Certificated Land".

H [20] The above shows that a non-bumiputera or non-Malay in some circumstances can be registered proprietors of MCL lands in Melaka. The burden of proof, as alluded to earlier, was on the respondents to prove assertively that the seventh respondent, if with a 40% non-bumiputera company, cannot hold MCL lands in Melaka. With respect, for reasons
I stated above, the respondents had failed to discharge that burden.

[21] As for the contention by the respondents that the appellant had breached his obligation in paying the instalment payments, we are of the view that this was never a complaint as can be seen in the letter dated

25 November 2013 (attached above) which only stated that there was no resolution from the respective fourth to seventh respondent to approve SSA and hence they were not bound by the SSA. That was their only reason for aborting the SSA. However, as alluded to earlier, the respondents' defence consisted of other reasons. We were fully aware that litigants are entitled to expand their reasons in the defence. That said, they risk the court from drawing inference that the so-called reasons contained in the pleaded defence may be all afterthoughts so to speak when those reasons were never mentioned at the very first opportunity. Common sense dictates that when litigants are represented by legal counsel, any letter in reply to a letter of demand as in this case would have contained all the legitimate reasons to abort the SSA. With regret, the learned judge did not take what we had just stated into consideration in arriving at his decision.

Conclusion

[22] This was a case where the trial judge, with respect, had misconstrued the issues before him, in that, he had failed to see that the contracting parties in the SSA are individuals where the subject matter is 40% shareholding in private companies. He had also failed to see that there was no legal impediment to amend the memorandum and articles of association of the sixth and seventh respondents to ensure the appellant become a shareholder of the same.

[23] In the circumstances, we allowed the appeal with costs in the sum of RM40,0000 for here and below subject to payment of allocatur fees. We ordered that the deposit be refunded back to the appellant. We also ordered that the High Court orders be set aside and granted the following orders:

- (a) It is ordered that subject to item five below, the respondents take all necessary steps within seven days from the date of this order to appoint or cause to be appointed the appellant as director of the fourth, fifth, sixth and seventh respondents.
- (b) It is ordered that subject to item five below, the first, second and third respondents take all necessary steps to transfer 40% of the shares of the fourth, fifth, sixth and seventh respondents to the appellant within 30 days of the payment of the balance sum of RM2,972,000 by the appellant to the respondents to be made within 30 days of the date of this order.
- (c) It is ordered that the first, second and third respondents shall within seven days from the date of this order, take all necessary steps to amend or strike out arts. 40a and 62a of the articles of association of the sixth respondents to enable the appellant to be registered as a member and to be appointed as director.
- (d) It is ordered that the first, second and third respondents shall within seven days from the date of this order, take all necessary steps to amend or strike out arts. 4a and 5a of the articles of association of the seventh

- A respondent to enable the appellant to be registered as a member and to be appointed as director.
- (e) It is ordered that the first, second and third respondents shall within seven days from the date of this order, take all necessary steps to apply for a certificate on behalf of the seventh respondent from the State Authority under s. 104 of the National Land Code (Penang and Malacca Titles) Act 1963 in order to entitle the seventh defendant with the appellant as the registered holder of 40% of its issued and paid up capital, to be registered as a proprietor of the Malacca Customary Land held under Lot No. 3, Kawasan Bandar III, District of Melaka Tengah and State of Melaka.
- (f) In the event the application to the State Authority shall be unsuccessful and all appeals in respect thereof are also unsuccessful, then damages are to be assessed by the Registrar and paid by the first, second and third respondents in respect of damages suffered by the appellant as a result of being unable to have registered in his name the 40% shares in the seventh respondent and such damages are to be assessed on the basis of the breach of cl. 7 of the share sale agreement dated 13 January 2011.
- (g) It is ordered that the first, second and third respondents, give accounts and inquiries of the fourth, fifth, sixth and seventh respondents in the following manner:
- (i) within 14 days from the date of this order, to file a full proper statement of accounts of the respondents of all monies received by the fourth, fifth, sixth and seventh respondents since the execution of the share sale agreement dated 13 January 2011 ordered by this court to be taken duly verified by affidavits and do within the same period serve a copy of the said account and affidavits on the appellant;
- (ii) that the respondents do produce to the appellant or his solicitors or that each party do give to the other access on demand all vouchers, books of account and other papers in the fourth, fifth, sixth and seventh respondents' possession or powers relating thereto;
- (iii) that the accounts of the respondents referred to in the affidavits of the first, second and third respondents are to be *prima facie* evidence of the truth of the matters therein contained but the appellant is at liberty to take such objections thereto as he may be advised; and
- (iv) that the appellant be at liberty within 14 days after the service of the said account and affidavits to serve on the respondents a notice in writing specifying the items in the said account (if any) to which he objects and the grounds of such objection.
- (h) It is also ordered that the parties be given liberty to apply in the High Court.